

DAVID A. PROVINSE

IBLA 80-113

Decided January 23, 1980

Appeal from decisions of the Montana State Office, Bureau of Land Management, rejecting oil and gas lease offers M 42874, M 42875.

Affirmed.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Lands Subject to -- Oil and Gas Leases: Discretion to Lease

It is proper for the authorized officer of the Bureau of Land Management to reject an offer for an oil and gas lease for lands, the title of which is in controversy.

2. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Lands Subject to

Land included in an outstanding oil and gas lease, whether the lease is void, voidable, or valid, is not available for leasing and an offer filed for such land must be rejected.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is taken from two decisions dated October 10, 1979, rejecting oil and gas lease offer M 42874 and partially rejecting offer M 42875.

The decision with respect to M 42874 stated as follows:

[O]ffer M 42874 \* \* \* described accretion in front of Lot 7, Sec. 35, T. 27 N., R. 57 E., P.M.M.

Your offer is rejected in its entirety because the land in front of Lot 7 is not accretion, but was formed from the bed of the river and would therefore belong to the State of Montana.

The land in M 42875 is described as "accretion in front of Lot 6, Sec. 7, T. 27 N., R. 56 E., P.M.M." The decision appealed from partially rejected this offer because part of the lands were embraced in two previously issued oil and gas leases. With respect to the remainder of the lands within appellant's offer the decision stated:

There is accretion in front of Lot 6, but this accretion would stop at the center of an old channel approximately 10 to 15 chains north.

As to the remaining lands in your offer, a period of thirty days is allowed in which to furnish a new description for the accretion in front of Lot 6 terminating at the old channel.

BLM's decisions were based on the opinions of the Chief, Branch of Cadastral Survey (Chief). In M 42874, a memorandum by the Chief states in part:

An old Missouri River chart, prepared in 1894, by the U.S. Corps of Engineers, shows several sandbars and sand islands in the same position as the land is now in front of the meanders of the left bank of the river, through sections 34 and 35.

An aerial photo (AZK 2HH 83 dated 7-12-67) shows a recent channel along the north shore of the river. The plat of the resurvey of this township, executed by Andrew Nelson in 1947, depicts the river as being wider through this area than at the time of the original surveys.

With respect to M 42875, the Chief opined as follows:

There is accretion in front of lot 6, section 7, but this accretion would stop at the center of an old channel approximately 10 to 15 chains north. This old channel is shown as flowing water on the 1947 resurvey by Andy Nelson. The land mass to the north of this old channel has apparently formed from the riverbed and would belong to the State of Montana, or could be the result of an avulsive change in the channel of the Missouri River.

Appellant asserts that the lands described in both offers were formed by accretion, not from the bed of the Missouri River or as the result of avulsion. Appellant bases his position in part on William R. Mills, A-30710 (February 28, 1968). An issue in that case

was whether a certain land mass contiguous to the Missouri River in North Dakota should be considered as an accretion to the mainland bordering the river or as islands with accretions thereto. Mills cited, with emphasis, the opinion of a land office engineer that the land in question had formed "as parallel bars growing from depositions in the riverbed near the left bank with the filling of channels outward from the upland" and that this was "not the same process by which an island arises from the bed of a river with no connection to the shore." Mills, p. 8. Mills also relied on aerial photographs taken in 1938, 1946, and 1957 which were interpreted as revealing that at times of high water there were sloughs and channels separating the land from the mainland, separating portions of the land mass, and leaving finger-like depressions following complete recession of the waters from lands attached to the mainland. Mills reached the following conclusion:

[W]e believe and find that the most satisfactory explanation of the formation of the land in dispute is that it was formed by accretions or relictions to the mainland caused by the change in the river's course, and that although at times there were sandbars and other formations surrounded by water, this was principally at times of high water; at times of low water portions of the land were connected to the mainland.

P. 10.

Appellant contends that accretion as defined in Mills is what occurred in the case at bar. Appellant has submitted aerial photographs, all dated 1967, showing the lands encompassed by his offers. On the photographs, appellant has outlined in blue, the "bank of the Missouri River as it was originally surveyed." Appellant asserts that channels which separated the bank from sandbars can still be identified on certain of the cultivated lands and that the accretion claimed in M 42874 is a continuation to the north bank of the river. With respect to two other photographs, on which the purported original meander line of the Missouri River is also outlined, appellant claims that lands which were once a part of the northeast bank are now part of an accretion on the south bank. Appellant claims that the adverse leases referred to in decision M 42875 are on this accretion, that they describe nonexistent lands and must therefore fail. Referring to a survey of February 9, 1893, and a dependent resurvey of July 20, 1949, appellant states that the shoreline has shifted to the north and east and that sandbars have joined the upland to form accretion to the south bank.

[1] There are several reasons why Mills, relied on by appellant, is not apropos here. In Mills, there was a body of data available on which a conclusion could reasonably be based that the land in question was formed by accretion. In the case at bar we have only the opinion

of Cadastral Survey that the land in issue was formed from the riverbed, opposed by appellant's conclusion that it was formed by accretion. Although appellant's opinion is supported by aerial photographs, appellant himself has modified these photographs, super-imposing thereon section boundaries and the purported meander lines of the river. Since issue has not been joined on the question of the nature of the lands' origin, we can only consider the conclusions appellant draws from the photographs as untested and self-serving statements. The absence of survey data and other expert evidence precludes a finding by this Board that the land was formed either from the riverbed or by accretion. Forest Oil Corporation, 15 IBLA 33 (1974).

We are thus left with the simple question whether an oil and gas lease should issue where title to the land covered thereby is not clearly shown to be in the United States. Where title to the land is in doubt, it is proper to reject the lease offers in issue. See Forest Oil, supra, and cases cited.

[2] Appellant's arguments concerning the outstanding leases have been repeatedly answered by this Board. It is firmly established that to the extent an offer to lease embraces lands presently under lease the offer is properly rejected regardless of whether the lease is void, voidable, or valid. David A. Provinse, 35 IBLA 221, 85 I.D. 154 (1978); Forest Oil, supra; Frances M. Kanowsky, 10 IBLA 358 (1973).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Frederick Fishman  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Joan B. Thompson  
Administrative Judge

